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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ..... 71-857

EVCO, a New Mexico Corporation, d/b/a
EVCO INSTRUCTIONAL DESIGNS,
*Petitioner,*

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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Evco, a New Mexico corporation, d/b/a Evco Instructional Designs, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New Mexico entered in the above entitled case on July 30, 1971 which, after denial of Writ of Certiorari to the Supreme Court of the State of New Mexico on September 29, 1971 became final by entry of Final Order on September 29, 1971.

This is the second time this case has come before this Court upon Petition for Writ of Certiorari to the Court of Appeals of the State of New Mexico. The first Petition, which was docketed on November 2, 1970, as No. 928, October Term, 1970, was granted. *Evco* v. *Jones, et al.*, 402 U.S. 969, 91 S. Ct. 1655, 29 L.Ed.2d 134 (1971). The Writ of Certiorari is printed in Appendix B hereto, *infra*, p. A26.

The New Mexico Attorney General in his Brief in Opposition to Petition for Writ of Certiorari in No. 928, stated:

> "While this document is entitled 'Brief in Opposition', Respondents wish to make it clear that they agree with Petitioner's position concerning the incorrectness of the New Mexico Court of Appeals decision on the second issue involved in *Evco* v. *Jones*, 81 N.M. 724, 472 P.2d 987 (1970)."

Upon reconsideration, as directed by this Court in its Writ of Certiorari, the Court of Appeals of the State of New Mexico decided the interstate commerce issue the same way it had decided it originally. Both Petitioner and Respondents urged that Court to adopt the position taken by Petitioner throughout.

## CITATIONS TO OPINIONS BELOW

The first opinion of the Court of Appeals of the State of New Mexico, printed in Appendix B hereto, *infra*, p. A2, is reported in 81 N.M. 724, 472 P.2d 987 (1970). The second opinion, also printed in Appendix B hereto, *infra*, p. A29 is reported in 488 P.2d 1214 (1971).

## JURISDICTION

The Court of Appeals of the State of New Mexico on remand, rendered the Judgment by Opinion on July 30, 1971. Rehearing was denied August 24, 1971. Application for Writ of Certiorari was denied by the Supreme Court of the State of New Mexico on September 29, 1971. Thereupon, the Final Order was entered by the Court of Appeals of the State of New Mexico on September 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## QUESTIONS PRESENTED

(1) Whether Petitioner's gross receipts from sales of tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, are exempt from New Mexico Emergency School Tax and New Mexico Gross Receipts Tax as being sales in interstate commerce.

## STATUTES INVOLVED

The statutory provisions involved are Art. I, Sec. 8, Cl. 3 of the United States Constitution; and Sec. 72-16A-14.10, N.M.S.A., 1953 Comp. (July 1, 1967). They are printed in Appendix A, *infra*, Al.

## STATEMENT

Direct appeal to the Court of Appeals of the State of New Mexico was taken by Petitioner taxpayer from a written order of Respondent Commissioner of Revenue, pursuant to Sec. 16-17-8 (F), N.M.S.A., 1953 Comp. (Supp. 1969), and Sec. 72-13-39, N.M.S.A., 1953 Comp. (Repl. 10, pt. 2, Supp. 1969). The case was presented to the lower Court upon a Stipulation of Facts.

In its opinion the lower Court decided that Petitioner was involved in the production or creation of tangible

personal property, and that sales thereof to the United States, the State of New Mexico, their departments and instrumentalities, and sales to certain nonprofit organizations, were exempt from the Emergency School Tax Act and the Gross Receipts Tax Act, by virtue of Sec. 72-16-5, N.M.S.A., 1953 Comp., and Sec. 72-16A-14.G, N.M. S.A., 1953 Comp.

In its opinion the Court further held that Petitioner's gross receipts from sales of such tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, are not exempt from the Emergency School Tax Act and the Gross Receipts Tax Act as being sales in interstate commerce. On June 17, 1970, both Petitioner and Respondent filed Motions for Rehearing. (Appendix B, *infra,* pp. A24-A25). Both Motions for Rehearing were denied on July 7, 1970. On July 20, 1970 Respondent filed a Petition for Writ of Certiorari to the Court of Appeals of New Mexico in the Supreme Court of New Mexico. (Appendix B, *infra,* p. A19). Petitioner filed its Response to Petition for Writ of Certiorari-Petition for Writ of Certiorari. The Supreme Court entered its Order denying both Petitions for Writ of Certiorari on July 31, 1970. (Appendix B, *infra,* p. A18). Thereupon, the Final Order of the Court of Appeals was entered August 4, 1970. (Appendix B, *infra,* p. A17).

Although Respondent in its Motion for Rehearing and Petition for Writ of Certiorari continued to assert its position that the subject matter of Petitioner's sales was the sale of "services" rather than the sale of "tangible personal property," Respondent joined Petitioner in asserting that if the sales were of tangible personal property to customers outside the State of New Mexico, where delivery is made outside the State of New Mexico, Petitioner's gross

receipts from such sales are exempt from Emergency School Tax and Gross Receipts Tax as being sales in interstate commerce.

Both Petitioner and Respondents asserted this same position before this Court and upon remand to the Court of Appeals of the State of New Mexico.

## REASONS FOR GRANTING THE WRIT

### I.

### Petitioner's Gross Receipts from Sales of Tangible Personal Property to Customers Outside the State of New Mexico, Where Delivery Is Made Outside the State of New Mexico, Are Exempt from New Mexico Emergency School Tax and New Mexico Gross Receipts Tax As Being Sales in Interstate Commerce.

The Court of Appeals states the facts applicable to the issue involved here as follows:

> "The taxpayer claims exemption here upon the ground that the imposition of the taxes would constitute a tax upon interstate commerce. Paragraph 9(j) of the Stipulation, as quoted, shows, and the taxpayer has so asserted in its Brief in Chief, that the contracts were negotiated and entered into outside the State of New Mexico, and the items of tangible personal property produced by the taxpayer pursuant to these contracts were delivered outside New Mexico. However, the actual performance of all work in the production of this property was accomplished by the taxpayer within New Mexico, where it maintains its principal office."

Although Respondent took the position on the direct appeal to the Court of Appeals that such sales were not exempt as being in interstate commerce, it joined with

the Petitioner in taking the opposite position in its Motion for Rehearing and Petition for Writ of Certiorari. (Appendix B, *infra*, pp. A24, A19).

The Emergency School Tax Act, which was in effect during the first part of the taxable period, contains no provision with respect to exemption of transactions in interstate commerce. Likewise, the regulations thereunder contain no such provision. For the taxable period after July 1, 1967, the Gross Receipts Tax Act provides:

> "Sec. 72-16A-14.10. Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States Constitution."

The Bureau of Revenue regulations promulgated under Sec. 72-16A-14.10 contained nothing specific with regard to either "inshipments" or "outshipments." On December 5, 1969, after the close of the taxing period specifically involved, the Bureau of Revenue adopted a new regulation, interpreting the applicability of this section, as follows:

> "Receipts of New Mexico sellers from sales of property to non-residents of New Mexico where delivery is made out-of-state by seller's vehicle, U. S. Mail, or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller." G. R. Regulation 14.10-2.

Of this subsequent regulation the Court of Appeals stated:

> "It appears this interpretation of the statute would clearly exempt the gross receipts from the sales in question from the Gross Receipts and Compensating Tax Act, but we are not required to determine whether this regulation is an invalid attempt to negate §72-

16A-14.10, supra, because the regulation does not apply to the taxing period with which we are concerned." (Appendix, B, *infra*, p. A14).

The Commerce Clause of the United States Constitution, Art. I, Sec. 8, Cl. 3, delegates to Congress the power "... to regulate commerce with foreign nations, and among the several states." Since the Constitution says nothing further with regard to what constitutes a regulation of interstate commerce, this determination has been worked out in a long series of decisions of this Court. Without attempting to review all the decisions in this complex area of the law, it is submitted that the case of *J. D. Adams Manufacturing Co.* v. *Storen, et al.*, 304 U.S. 307, 58 S. Ct. 913, 82 L.Ed. 1365 (1938), is controlling in this case.

In *Adams Manufacturing Co.*, the State of Indiana attempted to impose a privilege tax measured by gross receipts upon a corporation engaged in the business of manufacturing road machinery in Indiana, and selling its products both within Indiana and in interstate commerce. The tax in question, which was described as a privilege tax upon the receipts of gross income from sales, was held void under the Commerce Clause. The Supreme Court explained that there are constitutionally permissible methods by which a state can exact compensation for business activities occurring within its boundaries, such as an excise tax on manufacturing, but that a privilege tax on sales to persons located outside the state is not one of them. In *Adams Manufacturing Co.*, there is a suggestion that the tax might have been constitutional if it had been apportioned, 304 U.S. 307, 314. This suggestion has apparently not been followed in subsequent decisions of any courts. Conversely, in *Freeman* v. *Hewitt*, 329 U.S. 249, 67 S. Ct. 274, 91 L.Ed. 265 (1946), a decision voiding the imposition of the same Indiana tax upon the receipts of an Indiana seller from the

sale of securities through the New York Stock Exchange, the apportionment concept, as applied to receipts from selling, appears to be discarded. See, *Freeman* v. *Hewitt, supra,* at p. 259 (Rutledge, J., concurring).

Chapter 34, "State Taxation of Interstate Commerce," The Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, pp. 1037-61 (June 30, 1965) analyzes the decisions of the entire subject area. In a section entitled "The Taxability of Sales of Goods Shipped Out of the State", the Report concludes, apparently upon the basis of *Adams Manufacturing Co.*:

> "Only if a tax is imposed on manufacturing, producing, or extracting may gross receipts from goods shipped out of the State be included in the measure of the tax. Otherwise, the State of origin may not tax outshipments." *Supra,* 1039.

In a per curiam opinion, the Supreme Court recently held that Utah could impose a sales tax upon in-state sales, where the purchaser picked up the property in Utah and transported it out of state. Taxation of this transaction was considered constitutional since the passage of title and delivery took place within the State of Utah. *Utah Tax Commission* v. *Pacific States Cast Iron Pipe Co.,* 372 U.S. 605, 83 S. Ct. 925, 10 L.Ed. 2d 8 (1963).

Invoking the *Adams Manufacturing Co.* case, the U.S. Court of Appeals for the Ninth Circuit has voided the imposition of a gross receipts tax by the Territory of Guam upon receipts from sales of automobile parts to a purchaser located in the Philippines. Although the contract of sale was negotiated in Guam, delivery was to be made by the seller in the Philippines. *Manila Trading & Supply Co.* v. *Maddox,* 335 F.2d 150 (9th Cir., 1964).

The Court of Appeals of the State of New Mexico, in its Opinion printed in Appendix B hereto, *infra*, p. A29, places the burden of apportioning the tax upon the Petitioner. In this, the Court appears to treat the New Mexico Emergency School Tax and the New Mexico Gross Receipts Tax as if they were each taxes on "value added" rather than taxes upon gross receipts. The Court of Appeals fails to recognize any distinction between constitutionality of taxes where "outshipments" rather than "inshipments" are involved. It places reliance upon the case of *General Motors Corporation* v. *Washington, supra*, but fails to recognize that the tax involved was imposed upon shipments coming into the destination state.

Petitioner has found no recent decisions relating to constitutionality of tax on "outshipments." Respondent suggested in a brief below that perhaps this could be explained by the fact that most states have assumed that they were without power to tax sales of goods where delivery occurs outside the state, and have excepted these transactions from the general operation of their taxing statutes. This appears also to be what New Mexico has done with respect to the regulation cited above, which appears to be based upon the clear authority of this Court.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be granted in this case.

Respectfully submitted,

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